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IN THE

Supreme Court of the United States

October Term, 1963

No. 208

HARRY SCHACKMAN and HARRY GREENWALD,

Appellants,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

MOTION TO AFFIRM THE ORDER AND/OR DISMISS THIS APPEAL.

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PEOPLE OF THE STATE OF CALIFORNIA,

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On Appeal From the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

MOTION TO AFFIRM THE ORDER AND/OR DISMISS THIS APPEAL.

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the judgments of the Appellate Department of the Superior Court of the State of California, for the County of Los Angeles, rendered and entered on December 4, 1963, be affirmed, or that the appeals taken therefrom to this court be dismissed on the ground that the federal questions are so unsubstantial as to not warrant further argument, and that the said judgments appealed from rest upon an adequate non-federal basis.

Statement.

These are direct appeals from judgments entered December 4, 1963, by the Appellate Department of the Superior Court of the State of California, for the County of Los Angeles.

Briefly stated, appellants were charged in separate verified seven-count complaints with violation of

1. Section 311.2 of the California Penal Code (Appendix A)—displaying obscene material.
2. Section 39.04 of the Municipal Code of the City of Los Angeles (Appendix B)—neglecting to keep premises in a clean and wholesome condition . . . and permitting filthy and offensive matter to remain and accumulate.
3. Section 39.50 (a) of the Municipal Code of the City of Los Angeles (Appendix C)—conducting and maintaining a place of public amusement and public assemblage other than in a good, clean, sanitary condition, etc.
4. Section 39.50(b) of the Municipal Code of the City of Los Angeles (Appendix D)—conducting a moving picture show and place of public amusement and public assemblage without keeping clean and in good repair all floor coverings, chairs, equipment, etc.
5. Section 57.10.02 of the Municipal Code of the City of Los Angeles (Appendix E)—maintain a door in a passageway required as a means of egress from a portion of the building which could not be opened from the inside within 30 seconds without use of a key, tool, etc.

6. Section 57.10.23(a) of the Municipal Code of the City of Los Angeles (Appendix F)—owning and managing a building where people work or gather other than a dwelling, without providing a door serving as a way of egress with a sign bearing the word "Exit."

7. Section 57.04.03 of the Municipal Code of the City of Los Angeles (Appendix G)—operating a motion picture theatre and place of assemblage without a permit

The causes were consolidated for trial and the jury returned verdicts of guilty as to appellants on all counts.

Appellant Schackman was sentenced to 180 days on Count I, 180 days on Court II, to run consecutively with Count I. The trial court declined to sentence on Counts III and IV and imposed fines on Counts V, VI and VII (pp. 17 and 18 of docket).

Appellant Greenwald was sentenced to 180 days on Count I, 180 days on Count II to run concurrently. As to Counts III through VII his motion for new trial was granted and such counts were dismissed (p. 14 of docket).

The appeals to the Appellate Department of the Superior Court resulted in the reversal of Count I as to each appellant on the ground that the material purportedly obscene did not constitute *hard core pornography under Zeitlin v. Arnebergh* (1963), 59 Cal. 901, 383 P. 2d 152, decided subsequent to the trial of these actions.

Thus, the only statutes before this court are those insuring that places of public amusement and as-

semblage be maintained wiith due regard to the *health* and *safety* of the *public*.

The evidence presented at the trial disclosed that appellant Schackman owned and operated an "arcade" on Main Street in the City of Los Angeles and that appellant Greenwald was his employee. Such arcade was open to the public and featured the showing of motion pictures of nude girls on small individual coin-operated projection machines located in some 24 separate booths. [R. T. 424-438].

On September 30, 1961, Officer Michael F. McGann of the Los Angeles Police Department entered and went to the rear of the arcade, which was open to the public [R. T. 432-433]. and there viewed the moving pictures on four of the machines by placing money in the coin slots [R. T. 433-437]. He determined that the pictures were obscene within the meaning of Sections 311 and 311.2 of the Penal Code of the State of California (Appendix A).

The officer then conversed with appellant Greenwald, who revealed he had knowledge of the character of the pictures being shown on the machines [R. T. 432-436].

Soon thereafter appellant Greenwald was arrested for violation of Section 311.2 of the California Penal Code (Appendix A), displaying obscene material. The films were taken into custody and an investigation of the premises ensued.

Officer McGann testified that he could see the condition of the walls and floors in the rear of the arcade [R. T. 462-464], and that there was a strong smell of urine [R. T. 457-461]. During the trial there was an abundance of testimony as to streaks and stains on the walls of the booths and on the machines and floors that were easily visible [R. T. 462, 494-497, 770-774].

Sgt. Robert E. Kearney, a member of the Los Angeles Police Department assigned to the Scientific Investigation Division testified that in his expert opinion from scientific tests performed at the arcade on the night in question and later in the police laboratory, the streaks and stains about the premises were human semen [R. T. 770-774]. He further testified that each booth had approximately 50 to 75 separate semen stains on the average [R. T. 771]; that laboratory tests of scrapings taken from the arcade revealed semen [R. T. 771], and that a wet rubber prophylactic containing semen was found on the floor of the arcade [R. T. 768-770].

The investigation by Captain Buxton from the Public Assemblage Division of the Los Angeles Fire Department revealed that the exit door from the premises was obstructed and locked by means of a padlock and hasp and that there was no sign whatever indicating *exit* at or near the exit door [R. T. 674-676]. Also, there was no permit issued to the premises under Section 57.04.03 of the Los Angeles Municipal Code [R. T. 671-672].

Appellants appear to present five questions on appeal:

1. Whether Section 39.04 of the Los Angeles Municipal Code is unconstitutionally vague or indefinite.
2. Whether the Fourteenth Amendment to the Constitution of the United States requires that operators of places of public assemblage be notified of the existence of fire ordinances governing the conduct of such businesses.
3. Whether evidence introduced to support the conviction of the counts now before this court was obtained by illegal search and seizure.
4. Whether the sentence imposed constituted cruel or unusual punishment.
5. Whether plaintiff's exercise of its right under the California Constitution to a jury trial denied appellants equal protection of the law under the Fourteenth Amendment to the Constitution of the United States.
6. Whether the joinder of several offenses in different counts of the same complaint constitutes a denial of due process of law or right to trial by jury under the Sixth and Fourteenth Amendments to the Constitution of the United States.

ARGUMENT.

I.

Section 39.04 of the Los Angeles Municipal Code Is Not Unconstitutionally Vague or Indefinite.

Section 39.04 of the Los Angeles Municipal Code provides:

> "No person owning, leasing, acting as agent for, or occupying, or having charge of any premises shall fail, refuse or neglect to keep such premises in a clean and wholesome condition, or permit to be or remain upon such premises, any accumulation of manure, garbage, offal, rubbish, stagnant water or filthy or offensive matter of any kind, or any material which creates offensive or obnoxious odors or promotes fly breeding."

It is apparently appellants' contention that such words as "clean" and "wholesome" are vague or indefinite. However, they are words of common meaning.

In *People v. Balmer* (1961), 196 Cal. App. 2d Supp. 874, 879, 17 Cal. Rptr. 612, it was held:

> "The words clean, sanitary and good repair are not so vague or indefinite as to make the Administrative Code Sections unconstitutional."

This court has held sufficiently definite such terms as "loud and raucous noises" (*Kovacs v. Cooper*, 336 U. S. 77), "depravity, criminality, unchastity" (*Beauharnais v. Illinois*, 343 U. S. 250), "offensive, derisive or annoying words" (*Chaplinsky v. New Hampshire*, 315 U. S. 568).

As was stated in *Roth v. United States, Alberts v. California,* 354 U. S. 476, 491:

> ". . . [T]he Constitution does not require impossible standards; all that is required is that the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . ."

Certainly the words here in question meet the test.

II.

The Fourteenth Amendment to the Constitution of the United States Does Not Require That an Operator of a Business Have Actual Notice of the Fire Ordinances Regulating the Conduct of His Business.

Appellants contend they were entitled to notice of the existence of the fire ordinances manifestly enacted for the protection of the public invited to come upon the appellants' premises. However, neither ever took the stand to testify.

It is the general rule that ignorance of the law is no excuse, and, as stated in *United States v. Balin*, 258 U. S. 250, 252:

> ". . . in the prohibition or punishment of particular acts, the state may, in the maintenance of a public policy, provide 'that he who shall do them shall do them at his peril, and will not be heard to plead in defense good faith or ignorance.' Many instances of this are to be found in regulatory measures in the exercise of what is called the police power, where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes. . . ."

The subject matter of the legislation herein question bears little resemblance to the convict registration ordinance under consideration in *Lambert v. California*, 355 U. S. 225. There, the conduct involved was wholly passive—mere failure to register, and this court in such case emphasized that:

> "There is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition."

Surely the protection of members of the public from the peril of fire and filth in a place of business inviting their entry falls within this latitude.

III.

This Case Does Not Involye in Any Way Convictions Based Upon Illegally Obtained Evidence.

The premises purportedly searched were premises *open to the public* [R. T. 432-433].

California courts have held that "Merely to observe what is perfectly apparent to any member of the public who might happen to be on the premises is not a search" (*People v. Norton* (1962), 209 Cal. App. 2d 173, 176-177, 25 Cal. Rptr. 676), and ". . . Merely to observe what is perfectly apparent to anyone who might be within the store is not a search" (*People v. Roberts* (1960), 182 Cal. App. 2d 431, 437, 6 Cal. Rptr. 161).

In *People v. West* (1956), 144 Cal. App. 2d 214, 220, 300 P. 2d 729, it was held that the mere looking at that which is open to view is not a search." The *West* case was cited in *Ker v. California*, 374 U. S. 23, 43, as authority for the ruling that seeing what is before the observer in full view is not a search.

Of course the locked exit door, the lack of the required exit sign, and the semen stains were in full view.

IV.

The Sentences Imposed Did Not Constitute Cruel and Unusual Punishment.

Section 11.00(m) of the Los Angeles Municipal Code (Appendix H) provides, that any person violating any of the provisions or failing to comply with any of the requirements of such code shall be guilty of a misdemeanor, and unless provision is otherwise made, shall be punishable by a fine of not more than $500, or by imprisonment in the City Jail for a period of not more than six months, or by both such fine and imprisonment.

All of the sentences imposed in this case were within the maximum provided by such city ordinance.

In *In re Polizzotto* (1922), 188 Cal. 410, 412, 205 Pac. 676, the court, in commenting on a sentence under a county ordinance, stated:

> "It has often been held that a punishment by a fine of $500, or imprisonment for six months, or both, for an ordinary misdemeanor, is neither excessive, cruel, nor unusual."

In *Weems v. United States* (1909), 217 U. S. 349, 369, this court stated that there would appear to be nothing excessive, or cruel, or unusual in a fine of $50 and imprisonment at hard labor in a house of correction for three months imposed for keeping and maintaining, without a license, a tenement for the illegal sale and illegal keeping of intoxicating liquors.

The punishment imposed for violations of the provisions of the Los Angeles Municipal Code is the same as that imposed for general misdemeanor violations un-

der Section 19 of the Penal Code of the State of California (Appendix I).

Robinson v. California, 370 U. S. 660, cited by appellants as supporting their argument that the Los Angeles ordinances inflict cruel and unusual punishment, was not critical of the length of time in jail that may constitute the punishment, but went rather to the point that incarceration in jail is not appropriate punishment for the status of an illness, addiction to narcotics.

V.

Appellants' Subjection to Jury Trial Did Not Deny Them Equal Protection of the Laws Under the Fourteenth Amendment to the Constitution of the United States.

Article 1, Section 7 of the Constitution of the State of California provides:

> "The right of trial by jury shall be secured to all, and remain inviolate; but in civil actions three fourths of the jury may render a verdict. A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel, and in civil actions by the consent of the parties, signified in such manner as may be prescribed by law. In civil actions and cases of misdemeanor, the jury may consist of twelve, or of any number less than twelve upon which the parties may agree in open court."

In *People v. Spencer* (1959), 170 Cal. App. 2d 145, 149, 338 P. 2d 484, it was held that "It is necessary for the waiver of trial by jury to become effectual, for the defendant, his counsel and the District Attorney, to all consent."

In the instant case the prosecution merely did not waive its right to trial by jury, the result being a jury trial pursuant to the provisions of the California Constitution.

While appellants contend that this trial by jury denied them equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, they cite no applicable authority to support such a proposition.

VI.

Various Offenses Were Properly Joined in the Same Complaints.

Section 954 of the Penal Code of the State of California provides:

> "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court; provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups

and each of said groups tried separately. An acquittal of one or more counts shall not be deemed an acquittal of any other count."

In *People v. McKenna* (1953), 116 Cal. App. 2d 207, 210, 285 P. 2d 452, it was held:

> ". . . one may be convicted of more than one offense arising out of a single transaction if each is stated in a separate count and when the offenses differ in their necessary elements, the one is not included in any other."

In the complaints at hand, all of the counts were connected together in their commission through the transaction of operating the arcade.

As stated by this court in *Ashe v. United States ex rel. Valotta*, 270 U. S. 424, 425, it cannot be doubted that a state can authorize the whole story to be brought before a jury at once, even though two indictments were involved, without denying due process of law.

Conclusion.

Appellee urges, therefore, that the appellants present no substantial question for the decision of this court; that the judgments sought to be appealed from should be affirmed or the appeals dismissed.

Respectfully submitted,

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APPENDIX A.

Sections 311 and 311.2, California Penal Code.

§311. [Definitions.] As used in this chapter:

(a) "Obscene" means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

(b) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(d) "Distribute" means to transfer possession of, whether with or without consideration.

(e) "Knowingly" means having knowledge that the matter is obscene.

§311.2. [Sale or Distribution, etc., of obscene matter: Penalty.] Every person who knowingly: Sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor. (Stats. 1961, c. 2147, pp. 4427-4428, sec. 5.)

APPENDIX B.

Section 39.04, Municipal Code of the City of Los Angeles.

Sec. 39.04. Premises—Keeping Clean:

No person owning, leasing, acting as agent for, or occupying, or having charge of any premises shall fail, refuse or neglect to keep such premises in a clean and wholesome condition, or permit to be or remain upon such premises, any accumulation of manure, garbage, offal, rubbish, stagnant water of filthy or offensive matter of any kind, or any material which creates offensive or obnoxious odors or promotes fly breeding.

APPENDIX C.

Section 39.50(a), Municipal Code of the City of Los Angeles.

Sec. 39.50. Shows and Places of Assembly—Sanitation:

No person conducting, managing or operating any moving picture show or any theatre, dance hall, night club, circus, amusement park, or other place of public amusement or public assemblage shall fail, refuse or neglect to comply with the following requirements:

(a) The floors, walls, ceilings, doors, windows, stairways, hallways and every other part thereof shall be maintained in a good, clean, sanitary condition, and shall be painted or otherwise renovated whenever necessary.

APPENDIX D.

Section 39.50(b), Municipal Code of the City of Los Angeles.

Sec. 39.50. Shows and Places of Assembly—Sanitation.

No person conducting, managing or operating any moving picture show or any theatre, dance hall, night club, circus, amusement park, or other place of public amusement or public assemblage shall fail, refuse or neglect to comply with the following requirements:

(b) All rugs, carpets, or other floor coverings, tables, chairs, seats, counters, and all similar equipment shall be kept clean and in good repair.

APPENDIX E.

Section 57.10.02, Municipal Code of the City of Los Angeles.

Sec. 57.10.02. Obstruction of Exits:

No person shall erect, construct, reconstruct, install, alter or maintain any door, gate, partition, or similar obstruction in any passageway required as a means of egress from any portion of any building, or any public corridor or public stairway of any building, except a door or gate which can be removed or opened from the inside within 30 seconds without use of a key, tool or other implement or special knowledge.

APPENDIX F.

Section 57.10.23(a), Municipal Code of the City of Los Angeles.

Sec. 57.10.23. Exit and Directional Signs:

Every person owning or managing any building where people live, work or gather other than a dwelling shall provide exit and directional signs as hereinafter specified.

A. Type—Unless otherwise clearly and unmistakenly indicated as an exit, every exit door serving as a way of egress shall have placed over or adjacent thereto a sign bearing the word "EXIT" in letters not less than five inches high.

APPENDIX G.

Section 57.04.03, Municipal Code of the City of Los Angeles.

Sec. 57.04.03. Permits Required:

No person, without a valid Permit then in effect so to do: . . . [shall] establish, operate, maintain a theatre, motion picture theatre, and place of assemblage.

APPENDIX H.

Section 11.00(m), Municipal Code of the City of Los Angeles.

Sec. 11.00(m). Violations of this Code a Misdemeanor.

It shall be unlawful for any person to violate any provision or fail to comply with any of the requirements of this Code. Any person violating any of the provisions or failing to comply with any of the mandatory requirements of this Code, shall be guilty of a misdemeanor. Any person convicted of a misdemeanor under the provisions of this Code, unless provision is otherwise herein made, shall be punishable by fine of not more than $500.00 or by imprisonment in the City Jail for a period of not more than six months, or by both such fine and imprisonment. Each such person shall be guilty of a separate offense for each and every day during any portion of which any violation of any provision of this Code is committed, continued or permitted by such person, and shall be punishable accordingly.

In addition to the penalties hereinabove provided, any condition caused or permitted to exist in violation of any of the provisions of this Code shall be deemed a public nuisance and may be summarily abated as such by the City. Each day that such a condition continues shall be deemed to be a new and separate offense.

APPENDIX I.

Section 19, California Penal Code.

§19. Punishment for misdemeanor; punishment not otherwise prescribed.

Except in cases where a different punishment is prescribed by any law of this State, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding five hundred dollars, or by both. (Stats. 1933, c. 848, p. 2216, sec. 1.)